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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

YOSSI SABAG, Plaintiff and Appellant, v. FCA US LLC et al., Defendants and Respondents.	B290072 (Los Angeles County Super. Ct. No. BC629189)

APPEAL from an order of the Superior Court of Los Angeles County. Barbara A. Meiers, Judge. Reversed and remanded with directions.

Rosner, Barry & Babbitt, Hallen D. Rosner and Arlyn L. Escalante for Plaintiff and Appellant.

Hawkins Parnell Thackston & Young, Barry R. Schirm and Jeffrey T. Thayer for Defendants and Respondents.

Yossi Sabag appeals from the trial court's order awarding attorney fees following the settlement of Sabag's action against FCA US LLC (FCA) under the Song-Beverly Consumer Warranty Act (the Act). (Civ. Code, § 1790 et seq.) Sabag sued FCA after he purchased a defective Chrysler vehicle that FCA refused to repurchase. He ultimately obtained a settlement of $72,000, about twice the value of the vehicle, plus reasonable attorney fees and expenses to be determined by the court.

The trial court awarded $38,359 in attorney fees based on Sabag's calculated lodestar of $76,718.[1] The record shows that the court cut Sabag's lodestar figure in half because Sabag did not respond to a settlement offer to repurchase the vehicle that FCA made shortly after Sabag filed his lawsuit.

We reverse the attorney fee award and remand to the trial court for a determination of reasonable attorney fees based on the actual attorney time expended. The Act requires an award of attorney fees based upon "actual time expended" if the time was "reasonably incurred." (Civ. Code, § 1794, subd. (d).) The trial court did not award fees based on actual time expended, but instead concluded that all attorney fees Sabag incurred following FCA's initial settlement offer were unreasonable. This conclusion in effect applied the penalty provisions of Code of Civil Procedure section 998, even though FCA's settlement offer did not meet the requirements of that section and Sabag ultimately recovered

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[1] A lodestar figure is a " 'compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.' " (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131–1132, quoting *Serrano v. Priest* (1977) 20 Cal.3d 25, 48.)

about twice what FCA offered.[2] The trial court therefore abused its discretion in applying the wrong legal standard to the determination of attorney fees under the Act.

BACKGROUND

1. The Lawsuit

Sabag purchased a new 2014 Chrysler 300 on August 24, 2014. The purchase price was $37,903.64.

After purchase, the vehicle developed problems that led to a series of repair visits. Before filing his lawsuit, Sabag made at least two calls to FCA requesting that FCA repurchase the vehicle. FCA refused to do so.

Sabag filed his complaint on August 1, 2016, asserting claims under the Act. (Civ. Code, § 1790 et seq.) On September 6, 2016, FCA sent a letter with a settlement offer. FCA offered "restitution of the actual price paid or payable, including any incidental and consequential expenses incurred, pursuant to Civil Code 1793.2(d)(2)(B). In addition, FCA US LLC will pay reasonable attorney fees and costs pursuant to Civil Code 1794(d)." The letter requested "appropriate documentation" to permit calculation of the settlement amount, including "the sales contract or lease agreement, current registration, 30 day payoff and payment history." The offer was contingent on the receipt of these items, a return of the vehicle, and a "fully executed release." Sabag did not respond to the offer.

Significant litigation followed, including (1) FCA's removal of the case to federal court and a successful motion by Sabag to

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[2] Subsequent undesignated statutory references are to the Code of Civil Procedure.

remand; (2) written discovery; (3) five depositions and a vehicle inspection; (4) a motion to compel and for sanctions; and (5) numerous motions in limine in preparation for trial.

On August 22, 2017, FCA served a settlement offer pursuant to section 998. FCA offered $72,000 in exchange for a dismissal of the lawsuit with prejudice and return of the vehicle. FCA also offered "to pay reasonable costs, expenses and attorneys' fees based on actual time expended, pursuant to Civil Code section 1794(d) as stipulated by the parties or, if the parties cannot agree, upon motion to the Court having jurisdiction over this action." Sabag accepted the offer on September 20, 2017. The parties thereafter negotiated and executed a settlement agreement in which FCA agreed to pay "Plaintiff's attorney's fees, costs, and expenses in an amount determined by the Court by way of noticed motion to have been reasonably incurred by Plaintiff in the commencement and prosecution of this action, pursuant to Civil Code Section 1794(d)." The agreement acknowledged that Sabag was the prevailing party "for the purposes of any such motion."

2. The Motion for Attorney Fees

Sabag filed a motion on March 8, 2018, seeking up to $116,773.52 in attorney fees, costs and expenses. The fees component of the request included a lodestar of $76,718 with a requested multiplier of between .25 and .35, resulting in a range of an additional $19,179.50 to $26,851.30. Costs and expenses were $9,704.22.

FCA opposed the request, arguing that attorney fees should be limited to $2,488.50, representing "the amount of fees incurred through September 6, 2016, the date on which Plaintiff's counsel reviewed FCA's repurchase offer."

The trial court heard the motion on April 13, 2018. The court announced that its tentative ruling was to cut the requested lodestar in half. The court stated, "Frankly, I'm seeing a picture now emerging, not from one case, but from one case after another case after another case. And, initially, I had been a bit more generous, but I'm not going to be in the future. And the cases I'm referring to are cases where the defense has made an early offer to settle the case." The court told Sabag's counsel that "what you did was not respond at all to the defense offer. I'm not going to deal with that anymore. It's just not the way attorneys are going to do business on these lemon law cases, at least not in this court, and then come in looking for humongous attorney fees."

The court acknowledged that its decision to cut Sabag's requested fees in half was not based on an analysis of the lodestar figure. The court stated that "if you don't go back and talk to them and try to negotiate a reasonable settlement, then I'm not really interested in all of your lodestar and enhanced lodestar amounts generated after that initial refusal to talk."

In response to counsel's argument that Sabag ultimately recovered "substantially more" in the final settlement than FCA originally offered, the court stated, "That's the best you can say? [¶] . . . [¶] . . . So we'll just go on stonewalling the doors opening by the defense for settlement discussions, and we'll just continue playing it this way." The court explained that "[t]hen you're going to see your fees getting cut in half."

After hearing argument, the trial court ruled in accordance with its tentative decision. The court awarded $38,359 in attorney fees, "which may in fact be more than was incurred at the most important point of time, to wit, when Plaintiff determined not to respond in any way to Defendant's opening

efforts to settle." The court also awarded the requested amount of $9,704.22 in costs.

DISCUSSION

1. Standard of Review

The abuse of discretion standard applies to appellate review of an award of attorney fees under the Act. (*Goglin v. BMW of North America, LLC* (2016) 4 Cal.App.5th 462, 470–471.) However, the trial court must exercise its discretion in awarding fees subject to the legal standards that apply to its decision. (*Etcheson v. FCA US LLC* (2018) 30 Cal.App.5th 831, 841 (*Etcheson*).)

An appellate court reviews de novo any issues of law involved in determining whether the criteria for an award of attorney fees has been satisfied. (See *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213.) Accordingly, " '[T]he determination of whether the trial court *selected* the proper legal standards in making its fee determination is reviewed de novo [citation] and, although the trial court has broad authority in determining the amount of reasonable legal fees, the award can be reversed for an abuse of discretion when it employed the wrong legal standard in making its determination.' " (*Etcheson*, *supra*, 30 Cal.App.5th at p. 841, quoting *569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 434.)

The record shows that the trial court reduced Sabag's fee request because Sabag did not negotiate in response to FCA's initial settlement offer. The negotiation requirement that the trial court imposed affects the legal standard for an award of attorney fees under the Act. We therefore review that issue de novo.

2. The Trial Court Imposed a Requirement for an Award of Attorney Fees That Is Inconsistent with the Act

Civil Code section 1794, subdivision (d) provides that a buyer who prevails in an action under that section "shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees *based on actual time expended*, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." (*Ibid.,* italics added.) The trial court's attorney fee award here was not based on actual time expended.

The basis for the trial court's attorney fee award is clear from its comment that the court was "not really interested in all of your lodestar and enhanced lodestar amounts generated after that initial refusal to talk." The court expressly cut the amount of Sabag's requested fees in half to punish Sabag for his "stonewalling."

The trial court's decision could be viewed as based on actual attorney time if one were to conclude that only Sabag's attorney hours up to the time of FCA's initial settlement offer were reasonably incurred. That is apparently what the trial court found in noting that the amount of fees it ordered "may in fact be more than was incurred at the most important point of time," i.e., when Sabag did not respond to FCA's settlement offer.

However, this finding was erroneous. The Legislature has established a specific procedure for withholding an award of costs that are incurred following a settlement offer. Under section 998, a plaintiff's rejection of a specified settlement offer may preclude him or her from recovering "his or her postoffer costs" and require the plaintiff to "pay the defendant's costs from the time of the

offer." (§ 998, subd. (c)(1).)[3] However, this consequence follows only if a plaintiff ultimately fails to obtain a "more favorable judgment or award" than the defendant's offer. (*Ibid.*)

Here, FCA's initial settlement offer did not purport to be an offer under section 998, and it did not include sufficiently definite "terms and conditions" to qualify as an offer under that section. (§ 998; see *Etcheson*, *supra*, 30 Cal.App.5th at pp. 835, 845–846.) Moreover, Sabag obtained a more favorable result than FCA's initial offer. Indeed, Sabag ultimately recovered about double the actual price of the automobile that FCA originally offered as restitution.

The trial court's order in essence treated FCA's settlement offer as a valid section 998 offer, and then grafted an exception onto that section's requirement that the plaintiff must fail to obtain a more favorable outcome. The procedure the trial court followed ignored the more favorable result that Sabag obtained on the ground that Sabag declined to make his own settlement offer in response to FCA's.

The trial court thus applied the wrong legal standard to Sabag's motion for fees and costs. Stating that it "doesn't matter" whether FCA made a valid settlement offer under section 998, the trial court cut off FCA's responsibility to pay further attorney fees based upon a settlement offer that did not meet the requirements of section 998 and that would not have been sufficient to justify withholding costs even if that section were applicable.

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[3] Costs under section 998 include attorney fees awarded pursuant to statute. (§§ 998, subd. (a), 1033.5, subd. (a)(10)(B); *Mangano v. Verity, Inc.* (2008) 167 Cal.App.4th 944, 948.)

The court in *Etcheson*, *supra*, 30 Cal.App.5th 831, recently came to a similar conclusion based upon almost identical facts. In that case, as here, FCA refused to repurchase a malfunctioning vehicle prior to litigation. Then, after the purchaser filed a lawsuit, FCA made an informal offer of restitution and reasonable attorney fees in exchange for the vehicle and a release. The purchaser declined the offer. (*Id.* at p. 835.)

FCA subsequently served a section 998 offer for "restitution in an amount equal to the actual price paid for the vehicle . . . less an offset for plaintiffs' personal use, plus reasonable costs, expenses and attorney fees." (*Etcheson, supra,* 30 Cal.App.5th at p. 836.) The purchaser objected that the offer was vague and uncertain. Litigation continued for 15 months until FCA served another section 998 offer for a specific sum. The parties settled soon thereafter for $76,000 plus reasonable attorney fees and costs and an agreement that the purchaser was the prevailing party. The settlement amount was about twice the value of the vehicle, which the purchaser had originally bought for $40,040. (*Id.* at pp. 835–837.)

The purchaser filed a motion for attorney fees. The trial court awarded fees incurred only up to the time of FCA's first section 998 offer. The court found that FCA's original informal offer was not a valid section 998 offer, and that FCA's first section 998 offer " 'was vague.' " However, the court concluded that " 'the enforceability of a [section] 998 offer is not the issue before the Court. Rather the issue is whether the fees sought by the Plaintiffs were "reasonably incurred by [the Plaintiffs] in connection with the commencement and prosecution of [this] action." ' " (*Etcheson, supra,* 30 Cal.App.5th at p. 839.) The trial court decided that it could not make such a finding "when it appears abundantly clear that Defendant from the beginning was

trying to extricate itself from the case—simply asking the Plaintiffs to tell it what the appropriate dollar amount was—with no cooperation from the Plaintiffs." (*Ibid.*) The trial court awarded fees of only $2,636.90. (*Id.* at p. 840.)

The appellate court reversed. The court noted that the trial court used a "vague and invalid . . . section 998 . . . offer to cut off plaintiffs' attorney fees, under the apparent theory that it was unreasonable for plaintiffs' counsel to reject that offer or counsel should have been more cooperative in facilitating a settlement." (*Etcheson, supra,* 30 Cal.App.5th at p. 843.) The court held that the trial court erred when it "[i]n substance and effect . . . incorporated the penalty provisions of section 998 . . . into its reasonableness analysis, and failed to acknowledge that plaintiffs for their counsel's litigation efforts recovered an amount more than double the value of FCA's initial restitution offers." (*Ibid.*)

The same analysis applies here. The trial court erred by, in effect, applying section 998's penalty provisions to an informal settlement offer that was significantly less than what Sabag ultimately recovered.

We also note the practical difficulties with the approach that the trial court adopted here. The trial court was obviously troubled by Sabag's failure to respond at all to FCA's initial offer. But what if Sabag had responded with an offer to settle for his maximum possible recovery, including the full price of the vehicle and a penalty of twice the purchase price, and then refused to budge from that demand? Would that have been sufficient to preserve his entitlement to attorney fees? Presumably the trial court's standard would include some requirement of *good faith* negotiation, but that raises the question of how good faith should be evaluated. The trial court's approach would put the court in the position of judging the reasonableness of settlement offers

based upon uncertain and inherently subjective criteria. This could put pressure on plaintiffs and their counsel to settle for less than they believe the case is worth for fear that otherwise their attorney fees would be in jeopardy.

The Legislature has made a judgment about when costs may be withheld based upon a plaintiff's decision not to settle. FCA could have used the procedure prescribed by the Legislature to limit its exposure for costs by making a section 998 offer earlier in an amount at or above what it believed a jury might award. It did not do so and cannot now claim the benefits that section 998 provides.

3. FCA's Arguments Defending the Trial Court's Ruling Are Unpersuasive

FCA argues that the trial court has broad authority to determine what fees were reasonably incurred, and that, when a trial court reduces a fee request, an appellate court will " 'infer the court has determined the request was inflated.' " (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 998.) But we cannot rely on an inference when the trial court expressly described the basis for its ruling. As mentioned, the trial court explicitly stated that, absent an effort to "try to negotiate a reasonable settlement, then I'm not really interested in all of your lodestar and enhanced lodestar amounts generated after that initial refusal to talk." The court did not reduce Sabag's fee request because it thought that the hours incurred or hourly rates were excessive; it cut the fees in half because Sabag declined to negotiate in response to FCA's offer. As the court explained in *Etcheson,* " 'we cannot indulge in a presumption which contradicts an express recital in the record.' " (*Etcheson, supra,* 30 Cal.App.5th at p. 842, quoting *United States Elevator Corp. v. Associated Internat. Ins. Co.* (1989) 215 Cal.App.3d 636, 648.)

FCA does not cite any California case upholding a reduction in attorney fees based upon a plaintiff's decision not to negotiate where the plaintiff subsequently obtained a *more* favorable recovery. FCA cites *Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, 449–450, for the proposition that, in keeping with the public policy of encouraging settlement, a trial court has the discretion to decide whether fees incurred after an informal settlement offer were reasonable. However, in that case the plaintiff ultimately obtained a judgment that was *less* favorable than the settlement offer at issue. (*Id.* at pp. 444–445, 449.) The court reconciled its decision with section 998 by noting that the "basic premise of section 998 is that plaintiffs who reject reasonable settlement offers *and then obtain less than the offer* should be penalized for continuing the litigation." (*Id.* at p. 450, italics added.) *Meister* is therefore not applicable here. (Accord, *Etcheson, supra,* 30 Cal.App.5th at p. 850.)[4]

FCA argues that Sabag's failure to respond to its initial settlement offer means that there is "no evidence that the settlement Sabag finally agreed to accept was better than the settlement he could have obtained had he responded to FCA's initial settlement offer." In essence, FCA asks this court to speculate that FCA might have offered a similar settlement earlier if Sabag had negotiated. But what FCA offered and when

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[4] FCA cites cases from other jurisdictions that were decided under different statutory regimes. These cases are not persuasive in light of *Etcheson* and the analysis included in that case. (*Etcheson, supra,* 30 Cal.App.5th 831.) In any event, those cases all involved settlement offers that were as much as (or very close to) the plaintiffs' ultimate recovery.

was obviously within its control. While FCA might not have wanted to "negotiate against itself," as the trial court observed, FCA did not need to negotiate to accomplish the goal of capping its responsibility to pay Sabag's attorney fees. It could have simply made a formal offer under section 998 that was the most it was prepared to pay and that it believed was the same or more than a jury would award.

That is the procedure the Legislature has prescribed for withholding costs from a prevailing party. The tactical decision to serve such an offer might constrain a defendant's negotiation options, but it also puts pressure on a plaintiff to settle. By seeking to cut off its responsibility for subsequent attorney fees based on an informal settlement offer in an amount far less than it was ultimately prepared to pay, FCA wants to enjoy the benefit of a section 998 offer without the price of actually offering what a jury was likely to award.

Finally, FCA asserts that its initial settlement offer included all that Sabag was "legally entitled to recover." The assertion is puzzling. If Sabag had proved a willful violation of the Act, he could have recovered a civil penalty of two times actual damages. (Civ. Code, § 1794, subd. (c).) That potential recovery remained a threat throughout the litigation. FCA declined Sabag's request to repurchase his vehicle before he filed the litigation, which might have supported a willfulness finding. And the court never made a finding of lack of willfulness as a matter of law. We agree with the court in *Etcheson* that, "[a]bsent a court finding that FCA's conduct was not willful as a matter of law, plaintiffs were entitled to proceed to litigate the issue of FCA's willfulness and pursue their claims for not only restitution, but civil penalties under the Act." (*Etcheson, supra,* 30 Cal.App.5th at p. 847.)

4. Conclusion

The trial court abused its discretion in reducing Sabag's attorney fee request using an improper standard. We therefore reverse and remand for a redetermination of reasonable attorney fees based upon Sabag's calculated lodestar. FCA did not object below to the hourly rates of Sabag's counsel and did not provide any ground to conclude that the attorney time spent on particular tasks was unreasonable. Thus, the trial court should use Sabag's calculated lodestar as the foundation for its fee award. Should it apply any negative multiplier, the court should clearly explain its reasons for doing so based upon legitimate case-specific factors. (See *Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 41.)

DISPOSITION

The trial court's order awarding attorney fees is reversed. The matter is remanded with directions that the trial court award Sabag reasonable attorney fees for his counsel's services, including those performed after FCA's September 6, 2016 settlement offer, based on actual time expended. Sabag is entitled to his costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.